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No. 01-1456

IN THE
Supreme Court of the United States

IRA C. RITTER AND THE KROGER CO.,
Petitioners,

v.

JERRY STANTON AND RUTH A. STANTON,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Indiana

REPLY BRIEF FOR PETITIONERS

KARL L. MULVANEY
DAVID C. CAMPBELL
NANA QUAY-SMITH
BINGHAM MCHALE LLP
2700 Market Tower
10 West Market Street
Indianapolis, Indiana 46204
(317) 635-8900

JOHN G. ROBERTS, JR.*
CHRISTOPHER T. HANDMAN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

*Counsel of Record

Counsel for Petitioners

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REPLY BRIEF FOR PETITIONERS[1]

The Indiana Court of Appeals devoted an entire section of its decision—ten pages long—to the question whether it was appropriate to employ comparability analysis in evaluating the staggering $55 million compensatory damages award entered below. *See* Pet. App. 23a-32a. And throughout that discussion, the court made it perfectly clear that it considered itself bound by the Seventh Amendment, holding that "[t]he Seventh Amendment generally requires that the jury determine compensatory damages," Pet App. 23a, that "the Seventh Amendment constrains the ability of the judge to alter the award," *id.*, that "the discretion exercised by juries supports basic democratic values recognized in the Seventh Amendment," *id.* 29a, and—most telling of all—that "[b]ecause a comparability analysis effectively places a 'cap'

[1] Petitioners' Rule 29.6 Statement appears at Pet. ii.

on the jury's award regardless of the evidence, it can be considered to be second-guessing jury decisions *in a manner not permitted by the Seventh Amendment*." *Id.* 30a (emphasis added).

Respondents assert that the question of using comparability analysis had long been settled as a matter of Indiana law. Opp. 3-5. Why then the Court of Appeals felt it necessary to spend ten pages exploring that "settled" issue respondents never explain. Respondents also dismiss the Court of Appeals' Seventh Amendment analysis as amounting to nothing more than "scattered references" and "broad generalizations." Opp. 4, 6. Yet, characterizations aside, respondents are completely at a loss to explain why, if the Seventh Amendment played no substantive role in the Court of Appeals' decision, it was cited, much less as frequently as it was. More to the point, respondents never articulate why the court below would have gone on to ignore the Seventh Amendment after having described it as a constitutional provision that "requires," "constrains," "support[s]," and does "not permit[]."

Respondents' attempt to obfuscate the important federal question squarely presented by the petition is understandable, since they concede—as they must—that it is "this Court's established precedent that the Seventh Amendment does not apply to state court proceedings." Opp. 2. Yet try as they might, respondents simply cannot avoid the fact that the court below interpreted the Seventh Amendment to do just that. Accordingly, because the Court of Appeals based its "state-law determination * * * on an incorrect perception of federal law," this Court should grant the petition and adhere to its customary "practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state-law question free of misapprehensions about the scope of federal law." *Three Affiliated Tribes of Ft. Berthold Reservation* v. *Wold Eng'g P.C.*, 467 U.S. 138, 152 (1984).

1. In the petition, we explained that the Court of Appeals looked to the Seventh Amendment because the question whether to use a comparability approach remained an open one under Indiana law. *See* Pet. 6-7. For their part, respondents contend that previous decisions had already resolved the issue. Not so. To begin with, as respondents themselves recognize, the Court of Appeals devoted an entire section of the decision to the "Method of Analysis." Opp. at 6 & n.2. It simply strains credulity to suggest that such a lengthy exposition would be needed were the propriety of comparability analysis already settled. Moreover, were respondents correct, one would expect the court's analysis to begin and end with whatever controlling authority had presumably settled the issue. But instead, the court began with first principles enshrined by the Seventh Amendment: "In examining the question of the proper method of analysis, we have reviewed the role of the jury in awarding compensatory damages. The relationship between judge and jury with respect to compensation is clear. The Seventh Amendment generally requires that the jury determine compensatory damages." Pet. App. 23a.

The Court of Appeals examined its own precedents and determined that "Indiana courts have not previously adopted a comparability analysis for evaluating compensatory damage claims." *Id.* at 28a. But just because no Indiana court had yet adopted the comparability approach did not mean that the approach had been definitively rejected. Precisely for that reason, the Court of Appeals did not end its analysis there, but instead proceeded to devote the remainder of its discussion to resolving the unsettled question of whether the comparability approach is proper. *See id.* at 28a-32a.

2. On that point, as we explained in the petition, Pet. 9-11, the court squarely held that the Seventh Amendment constrained it from employing comparability analysis. Respondents, however, insist there is "[n]o hint" of the Seventh Amendment "in the court's explanation of why it

would not engage in comparative analysis to evaluate the reasonableness of the jury's verdict." Opp. 4. But the court did much more than just hint at the Seventh Amendment's constraints; it emphatically held that "comparability analysis effectively places a 'cap' on the jury's award * * * in a manner not permitted by the Seventh Amendment." Pet. App. 30a. And the court's reliance on the Seventh Amendment comes across loud and clear when, with no subtlety of language, the court concludes that "determination of compensation lies at the heart of the jury's *constitutional* province" and that "the Seventh Amendment constrains the ability of the judge to alter the [jury's] award." *Id.* at 23a (emphasis added).

Respondents attempt to minimize the significance of the court's reliance on the Seventh Amendment is wholly unavailing. Invoking the maxim that this Court " 'reviews judgments, not statements in opinions,' " Opp. 5 (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)), respondents dismiss out of hand the Court of Appeals' Seventh Amendment analysis because the court did not explicitly add "any language" to the decision expressly "asserti[ng] that the statements are a finding, ruling, holding, or decision of the court." *Id.* But there is no requirement that an appellate court explicitly identify the sentences or paragraphs that comprise its holding; and respondents certainly cite no authority to support such a peculiar rule. Notwithstanding the court's "failure" to label its holding as such, there is no doubt that the Seventh Amendment played a dispositive role in the court's analysis. The court not only held that "comparability analysis * * * can be considered to be second-guessing jury decisions in a manner not permitted by the Seventh Amendment," Pet. App. 30a, but it also concluded that, were it to adopt the comparability approach, "[t]he right to jury determination of compensatory damages would become a hollow guarantee." *Id.*

3. Respondents recognize that this Court has "adopted a conclusive presumption" for determining whether this Court has jurisdiction to review a state court decision. Opp. 11. *See Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983) ("when * * * a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so"). Turning a blind eye once again to the Court of Appeals' reliance on the Seventh Amendment, respondents deny that the decision "fairly appears to rest primarily on federal law, or to be interwoven with federal law," *id.*, simply because the court below failed to craft its decision to comply with technical requirements wholly of respondents' own making. *See* Opp. 12-13. Thus while respondents grudgingly concede that the court did, in fact, "mention[ ] Seventh Amendment law," they find the court's repeated references to be irrelevant because "the exact language of the Seventh Amendment is not quoted in the opinion." *Id.* at 13. By the same token, respondents find the federal question decided by the Court of Appeals to vanish simply because the court neglected to include in its decision "discussion of and citation to federal cases." *Id.* at 12; *see id.* at 13.

Respondents are wrong, both in terms of what the law requires and their reading of the decision below. To begin with, this Court has never prescribed any minimum citation requirements as respondents suggest. And as a matter of practice, this Court has of course accepted jurisdiction over cases, like this one, where the state court decision cites a federal constitutional provision but not a federal case. *See Stincer* v. *Commonwealth*, 712 S.W.2d 939, 940-942 (Ky. 1986), *rev'd sub nom. Kentucky* v. *Stincer*, 482 U.S. 730 (1987). Moreover, the Court of Appeals clearly indicated

that it had analyzed this Court's decisions and the relevant Seventh Amendment precedents in reaching its holding: "In examining the question of the proper method of analysis, we have reviewed the role of the jury in awarding compensatory damages. * * * Supreme Court doctrine, historical practices prior to the adoption of the Seventh Amendment, and functional considerations all indicate that determination of compensation lies at the heart of the jury's constitutional province." Pet. App. 23a.

4. For all respondents' concern with the way in which the Court of Appeals drafted its decision, they have surprisingly little to say about the one true "plain statement" rule this Court has actually adopted for cases in which a state court decision fairly appears to rest on or to be interwoven with federal law. *See Long*, 463 U.S. at 1041-42. Nowhere in their brief in opposition do respondents identify where the court below "offer[ed] a plain statement that its references to federal law were 'being used only for the purpose of guidance, and did not themselves compel the result that it reached,' " *Arizona* v. *Evans*, 514 U.S. 1, 10 (1995) (quoting *Long*, 463 U.S. at 1041), or where the court below articulated a " 'plain statement' that [its] decision rests upon adequate and independent state grounds." *Long*, 463 U.S. at 1042.

To the extent respondents acknowledge this Court's rule, they protest that to require such a statement here would "exalt[ ] form over substance," or "would be superfluous." Opp. 13, 16. But this Court's precedents are clear: once it has been shown that the decision below fairly appears to rest on federal law, this Court "*require[s]* that it contain a plain statement that [it] rests upon adequate and independent state grounds." *Illinois* v. *Rodriguez*, 497 U.S. 177, 182 (1990) (emphasis added) (internal quotation omitted). As we explained in the petition, Pet. 11-12, no such plain statement exists, and respondents say nothing to the contrary.

Moreover, the reasons respondents feel a plain statement would be unnecessary are not nearly as conclusive as they suggest. Respondents insist throughout their brief that adequate and independent state grounds exist because the Court of Appeals took note of "Indiana's historical regard of the uniqueness of every tort claim and the belief that compensatory damage assessments should be individualized and within the discretion of the fact-finder," Opp. 3 (quoting Pet. App. 28a), and the fact that "the search for comparable or similar cases is inherently flawed." *Id.* at 16 (quoting Pet. App. 31a). Indeed, respondents attach such talismanic significance to these two spare statements that they cite them at every turn in their brief. *See* Opp. 3, 4-5, 7, 8, 10, 16, 17-18.

But these observations are not at all inconsistent with the comparability analysis the Court of Appeals rejected. The Fifth Circuit, for example, also recognizes that "each case depends on its own facts," but nevertheless finds that "comparing damage awards in similar cases is helpful in determining whether a particular award is excessive." *Wheat* v. *United States*, 860 F.2d 1256, 1259 (5th Cir. 1988). The same is true in other courts that employ the comparability approach. *See, e.g.*, *Nairn* v. *National R.R. Passenger Corp.*, 837 F.2d 565, 568 (2d Cir. 1988) ("In order to determine whether a particular award is excessive, courts have found it useful to review awards in other cases involving similar injuries, while bearing in mind that any given judgment depends on a unique set of facts and circumstances."); *Yankey* v. *McHatton*, 444 S.W.2d 745, 747 (Ky. Ct. App. 1969) ("Our cases have consistently recognized that 'determination of the propriety of personal injury verdicts depends upon the facts of the particular case *and* what compensation has been upheld for similar injuries' ") (quoting *Lyon* v. *Prater*, 351 S.W.2d 173, 176 (Ky. Ct. App. 1961)) (emphasis added). Similarly, courts have continued to use comparability analysis despite the obvious fact that no two cases will

present identical circumstances. *See, e.g., Palenkas* v. *Beaumont Hosp.*, 443 N.W.2d 354, 358 (Mich. 1989) (recognizing that no previous case "presents the identical facts and evidence as that heard by the jury in the instant case," but nevertheless employing comparability analysis because "[w]hile such a comparison cannot serve as an exact indicator, it does provide an objective means of determining the range of appropriate awards in such cases").

Indeed, this Court has "approve[d]" the "line of decisions" in which " 'every circuit has said that there are circumstances in which it can reverse the denial of a new trial if the size of the verdict seems to be too far out of line.' " *Gasperini* v. *Center for Humanities*, 518 U.S. 415, 435-436 (1996) (quoting 11 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2820, at 209 (2d ed. 1995)). Such approval would be inconsistent with respondents' assertion that comparability analysis is somehow "inherently flawed." Opp. 16.

Because respondents' asserted state-law rationales turn out to be neither adequate nor independent of the court's Seventh Amendment holding—not to mention the utter absence of a plain statement saying as much—this Court's jurisdiction is secure. And in any event, any lingering doubt about the basis for the court's holding must be resolved in favor of assuming jurisdiction. As this Court has held, "it is * * * important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 557 (1940).

5. On the merits, respondents make no argument, having placed all their eggs in the jurisdictional basket. In fact, they rightly acknowledge that it is "this Court's established precedent that the Seventh Amendment does not apply to state court proceedings." Opp. 2.

Indeed, apart from their spurious jurisdictional objections, respondents offer no reason why this Court should not follow its standard "practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state-law question free of misapprehensions about the scope of federal law." *Three Affiliated Tribes*, 467 U.S. at 152. As we explained in the petition, Pet. 12-13, the need for following that practice is particularly acute here, since there is good reason to assume that the court's decision to uphold the colossal $55 million judgment entered against Kroger and Ritter " 'might have been decided differently if the court below had felt free' " to ignore what it perceived to be the constraints of the Seventh Amendment. *United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623, 632-(1973) (quoting *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 443 (1952)). *See* Pet. App. 32a (acknowledging that it would otherwise be "tempting to engage in * * * comparative analysis to aid us in the difficult task of evaluating such a large award").

* * * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted, the judgment below reversed, and the case remanded to the Court of Appeals for reconsideration free of the misapprehension that the Seventh Amendment constrains appellate review of jury compensatory damages awards in state court.

Respectfully submitted,

KARL L. MULVANEY
DAVID C. CAMPBELL
NANA QUAY-SMITH
BINGHAM MCHALE LLP
2700 Market Tower
10 West Market Street
Indianapolis, Indiana 46204
(317) 635-8900

JOHN G. ROBERTS, JR.*
CHRISTOPHER T. HANDMAN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

*Counsel of Record

Counsel for Petitioners